

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

CHARLIE ALLEN SIMS,

Defendant-Appellee.

UNPUBLISHED

July 6, 2004

No. 245565

Wayne Circuit Court

LC No. 02-007940-01

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHARLIE ALLEN SIMS,

Defendant-Appellant.

No. 249964

Wayne Circuit Court

LC No. 02-007940-01

Before: Wilder, P.J., and Hoekstra and Kelly, JJ.

PER CURIAM.

Defendant was convicted of possession of 50 to 225 grams of cocaine, MCL 333.7403(2)(a)(iii)¹ and possession of marijuana, MCL 333.7043(2)(d). At sentencing, defendant argued that with the enactment of statutory sentencing guidelines, the mandatory minimum sentence required by MCL 333.7403(2)(a)(iii) for his cocaine conviction ceased to apply. The prosecution argued that the mandatory minimum sentence continued to apply unless, as specified in the statute, the trial court stated substantial and compelling reasons to depart from the mandatory minimum. The trial court adopted defendant's position and sentenced defendant,

¹ Effective March 1, 2003, the Legislature amended MCL 333.7403 to, among other things, eliminate certain mandatory minimum sentences and redefine the offenses described in the statute. The citations to MCL 333.7403(2)(a)(iii) in this opinion refer to the version of the statute in effect before March 1, 2003.

as a habitual offender, fourth offense, MCL 769.12, to eighty months to thirty years' imprisonment for the conviction of possession of cocaine. Defendant was sentenced to time served for the conviction of possession of marijuana.

In Docket No. 245565, the prosecutor appeals as of right the judgment of sentence. In Docket No. 249964, defendant appeals as of right his possession of cocaine and possession of marijuana convictions. We affirm defendant's convictions, vacate the sentence for possession of cocaine, and remand for resentencing.

Docket No. 245565

The prosecution argues on appeal that the trial court erred because it failed to state substantial and compelling reasons for departing from the mandatory minimum sentence required by MCL 333.7403. We agree. The interpretation of a statute is a question of law subject to review de novo. *People v McGee*, 258 Mich App 683, 693; 672 NW2d 191 (2003). Whether an amendment to a statute should be applied retroactively is also a question of law that we review de novo. *People v Thomas*, 260 Mich App 450, 458; 678 NW2d 631 (2004).

Defendant was sentenced on November 13, 2002, for the commission of an offense that was committed prior to March 1, 2003, the effective date of the amendment to MCL 333.7403(2)(a)(iii). Because "[a]mendments of statutes are generally presumed to operate prospectively unless the Legislature clearly manifests a contrary intent," defendant was required to be sentenced under the pre-amendment version of MCL 333.7403(2)(a)(iii), which mandated the imposition of a minimum sentence of ten years, absent substantial and compelling reasons for departure. See *Thomas, supra* at 458, citing *Tobin v Providence Hosp*, 244 Mich App 626, 661; 624 NW2d 548 (2001). *People v Schultz*, 435 Mich 517, 526; 460 NW2d 505 (1990), upon which defendant relies, is inapplicable. *Thomas, supra* at 457, 459.

Furthermore, the trial court misconstrued MCL 769.34(2)(a) by concluding that it was not required to state substantial and compelling reasons for departing from the mandatory minimum. MCL 769.34(2)(a) states in relevant part:

If a statute mandates a minimum sentence for an individual sentenced to the jurisdiction of the department of corrections, the court *shall* impose [a] sentence in accordance with *that* statute. Imposing a mandatory minimum sentence is not a departure under *this* section. If a statute mandates a minimum sentence for an individual sentenced to the jurisdiction of the department of corrections and the statute authorizes the sentencing judge to depart from that minimum sentence, imposing a sentence that exceeds the recommended sentence range but is less than the mandatory minimum sentence is not a departure under *this* section. [Emphasis added.]

The plain language of MCL 769.34(2)(a) does not exempt the trial court from the requirement that it comply with the provisions of MCL 333.7403(2)(a)(iii). Rather, MCL 769.34(2)(a) merely provides that a sentence under MCL 333.7403(2)(a)(iii) which, based on a finding that there are substantial and compelling reasons, departs from the mandatory minimum required by that section, does not also constitute a departure from the sentencing guidelines range that might otherwise apply absent the mandatory minimum requirement. Thus, the trial court erred in

relying on MCL 769.34(2)(a) as justification for departing from the mandatory minimum without stating substantial and compelling reasons for its departure, and defendant must be resentenced.

Docket No. 249964

Defendant first argues on appeal that the trial court erred by permitting the prosecution to reopen the proofs to admit evidence of the weight of the substance seized at the home exited by defendant, and that the substance was cocaine. The prosecution admitted this evidence by way of a disputed stipulation regarding the evidence. We find no error. A trial court's decision to reopen proofs is reviewed for an abuse of discretion. *People v Herndon*, 246 Mich App 371, 419; 633 NW2d 376 (2001). In ruling on a motion to reopen proofs, the trial court considers whether any undue advantage, surprise, or prejudice results to either party. *People v Solomon (Amended Opinion)*, 220 Mich App 527, 532; 560 NW2d 651 (1996), quoting *People v Collier*, 168 Mich App 687, 694-695; 425 NW2d 118 (1988).

Here, defense counsel stated on the record that: “. . . For purposes of these proceedings, we would not object to the admission of . . . contraband that they have seized, nor would we challenge any chain and [sic] custody. [The prosecutor] need not accept it, but for these purposes we will stipulate that they found whatever they said.” The prosecution did not acknowledge this offer on the record, and concluded its presentation of evidence and rested its case without obtaining testimony as to the weight and type of substances seized. The trial court denied defendant's motion for directed verdict and permitted proofs to be reopened to introduce evidence that defendant stipulated to these evidentiary elements. The trial court did not abuse its discretion in permitting proofs to be reopened. Defense counsel stipulated to the contents of the chemist's report, and the fact that the prosecution's request to present this evidence to the jury occurred after resting its case created no undue advantage and caused no surprise or prejudice to defendant.

Next, defendant argues that there was insufficient evidence to support his conviction. We disagree. “In reviewing whether there was sufficient evidence to support a conviction, . . . we view the evidence in a light most favorable to the prosecution to decide whether any rational fact-finder could have found that the essential elements of the crime were proven beyond a reasonable doubt.” *People v Knowles*, 256 Mich App 53, 58; 662 NW2d 824 (2003), citing *People v Hunter*, 466 Mich 1, 6; 643 NW2d 218 (2002).

Defendant contends that the evidence failed to establish his knowledgeable possession of controlled substances. A person need not have physical possession of a controlled substance to be found guilty of possessing it. *People v Wolfe*, 440 Mich 508, 519-520; 489 NW2d 748 (1992). Possession may be either actual or constructive. *Id.* at 519-520. The essential question is whether the defendant had dominion or control over the controlled substance. *People v Konrad*, 449 Mich 263, 271; 536 NW2d 517 (1995). A person's presence at the place where the drugs are found is not sufficient, by itself, to prove constructive possession; some additional link between the defendant and the contraband must be shown. *Wolfe, supra* at 520. However, circumstantial evidence and reasonable inferences arising from the evidence are sufficient to establish possession. *People v Fetterly*, 229 Mich App 511, 515; 583 NW2d 199 (1998).

The prosecution introduced evidence that the police set up surveillance of the premises after receiving information that there was narcotics trafficking at the location. During the

surveillance, the police observed several people enter the premises empty-handed but leave with a paper bag. A police officer observed defendant leaving this location, where drugs were found, three hours before the search warrant was executed. After defendant left, there was no traffic coming to or from the location. A broken down car belonging to defendant was parked in the driveway of the location. Men's clothing and men's shoes were found at the location. Keys to the front door of the premises were confiscated from defendant's person upon arrest, and no one else was present in the house when the warrant was executed. Based on all of the above evidence, a rational jury could logically have inferred from the circumstances that defendant had the right to exercise control of the narcotics found in the premises and therefore constructively possessed them. *Fetterly, supra*. The jury also could have logically inferred from the particular evidence establishing defendant's possession of the narcotics that he knew that he possessed controlled substances. *People v Hardiman*, 466 Mich 417, 429; 646 NW2d 158 (2002).

We affirm defendant's convictions, vacate the judgment of sentence in part, and remand for resentencing on the possession of cocaine conviction. We do not retain jurisdiction.

/s/ Kurtis T. Wilder

/s/ Joel P. Hoekstra

/s/ Kirsten Frank Kelly